Supreme Court, U.S.
FILED
FEB 16 1997
CLERK

No. 96-1135

In The

Supreme Court of the United States

October Term, 1996

CITY OF DETROIT PENSION FUND and CITY OF DETROIT POLICE and FIREMAN PENSION FUND,

Petitioners,

vs.

PRUDENTIAL SECURITIES INCORPORATED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GARY M. SARETSKY
Counsel of Record
HERTZ, SCHRAM & SARETSKY, P.C.
Attorneys for Respondent
1760 South Telegraph
Suite 300
Bloomfield Hills, Michigan 48302
(810) 335-5000

70227 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to dismiss the Pension Funds' petition to confirm arbitration award and grant PSI's motion to enjoin and dismiss arbitration claim?

2. Whether the ineligibility of the Pension Funds' arbitration claim presented a threshold arbitrability issue appropriate for judicial resolution?

LIST OF THE PARTIES

Petitioners are the City of Detroit Pension Fund and City of Detroit Police and Fireman Pension Fund.

Respondent is Prudential Securities Incorporated. a wholly owned subsidiary of the Prudential Insurance Company of America.

TABLE OF CONTENTS

	Page
Counter Statement of Questions Presented	i
List of the Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Counter Statement of the Case	1
Reasons for Denying the Writ	6
I. The District Court Had Diversity Jurisdiction To Dismiss The Funds' Petition For Confirmation Of Arbitration Award And Grant PSI's Motion To Enjoin And Dismiss Arbitration Claim.	7
A. The Sixth Circuit's Conclusion.	7
B. The Parties Are Citizens Of Different States.	8
C. The Amount In Controversy Exceeds $50,000.	9
II. Ineligibility Of The Funds' Arbitration Claim Presented A Threshold Arbitrability Issue Appropriate For Judicial Resolution.	11

Contents

Page

A. Courts (And Not Arbitrators) Decide Whether A Dispute Is Arbitrable, As Well As What Issues Must Be Arbitrated. 12

B. Section 15 Is Neither In Conflict With Nor Overridden By Other Sections Of The NASD Code Of Arbitration. 14

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) 12, 14

Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474 (10th Cir. 1996) 13, 14, 16

Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993) 12, 13

Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992) 13, 15

Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969) 10, 11

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) 10

Contents

	Page
Leininger v. Leininger, 705 F.2d 727 (5th Cir. 1983) .	11
Litton Financial Printing Division v. NLRB, 501 U.S. 190, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991) ..	12, 14
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995)	13, 15, 16
The Ohio Company v. Nemecek, 98 F.3d 234 (6th Cir. 1996)	5, 13
PaineWebber v. Hartmann, 921 F.2d 507 (3rd Cir. 1990)	13
PaineWebber, Inc. v. Allen, 45 F.3d 427 (4th Cir. 1995), *cert. denied*, 133 L. Ed. 2d 17, 116 S. Ct. 52 (1995), *affirming without opinion district court's conclusion*, 888 F. Supp. 53 (E.D. Va. 1993)	13
Roney and Co. v. Kassab, 981 F.2d 894 (6th Cir. 1992)	12
St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938)	10
Statutes Cited:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332	5, 7, 9

Contents

	Page
28 U.S.C. § 1332(a)	7, 11
28 U.S.C. § 1332(c)	7
Rules Cited:	
New York Stock Exchange, Rule 603	5
Supreme Court Rule 10(a)	6
Supreme Court Rule 15.2	1
Other Authorities Cited:	
C. Wright, *Federal Courts* § 34 (1963)	11
NASD Code of Arbitration Procedure:	
Section 6	14, 15, 16
Section 12	4
Section 15	2, 4, 5, 6, 14, 15, 16
Section 35	14, 15

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 91 F.3d 26 (6th Cir. 1996) and is reproduced in the Supplemental Appendix for Petitioners, Appendix A at pp. 1sa-8sa. Denial of the petition for rehearing and suggestion for rehearing *en banc* is reported at 1996 U.S. APP. LEXIS 27505 (6th Cir. Oct. 4, 1996).

The opinion and order of the United States District Court for the Eastern District of Michigan is unreported, but is reproduced in the Supplemental Appendix for Petitioners, Appendix B at pp. 9sa-18sa.

STATEMENT OF JURISDICTION

Jurisdiction is premised upon 28 U.S.C. § 1254(1). The United States Court of Appeals for the Sixth Circuit entered judgment on July 31, 1996 affirming the judgment of the district court. The court of appeals thereafter denied the Pension Funds' petition for rehearing and suggestion for rehearing *en banc* on October 3, 1996.

COUNTER STATEMENT OF THE CASE

In accordance with Supreme Court Rule 15.2, a Counter Statement of the case is necessary because the petition for a writ of certiorari recites as "fact" assertions which are untrue, not part of the record and were not decided below.

Petitioners, the City of Detroit Pension Fund and City of Detroit Police and Fireman Pension Fund ("Petitioners" or the "Funds"), maintained investment accounts at Respondent, Prudential Securities Incorporated ("Respondent" or "PSI"), a securities brokerage firm. Disappointed with the performance

of investments made in 1985 and 1986, the Funds brought an arbitration claim against PSI before the National Association of Securities Dealers, Inc. ("NASD") on February 2, 1994. (DCR[1] 2, Ex. 1).

The Funds' arbitration claim was accompanied by an NASD Uniform Submission Agreement. Through the Uniform Submission Agreement, the Funds agreed to arbitrate their claims "in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure" of the NASD. (DCR 2, Ex.1). Section 15 of the NASD's Code of Arbitration Procedure (the "Code") erects an absolute jurisdictional barrier to stale arbitration claims:[2]

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

The Funds' 1994 arbitration claim was filed 8-9 years after the disputed 1985-86 investments. The Funds' claim was, therefore, ineligible for arbitration pursuant to § 15 of the Code.

---

1. DCR refers to the district court record.

2. During 1996, the NASD renumbered the provisions of its Code of Arbitration Procedure. Former § 15 of the Code is now referred to as NASD Rule 10304. A substantial body of law interpreting and applying § 15, however, has developed over the years. Practitioners and courts, alike, continue to refer to the NASD's eligibility rule as "§ 15." As a result, for simplicity, this brief shall continue to refer to the NASD's eligibility rule as § 15.

PSI timely notified the NASD and opposing counsel that it objected to the NASD's exercise of jurisdiction, and that it intended to file a federal district court petition to enjoin and dismiss the arbitration. (DCR 3, Exs. 1 and 2). The NASD acknowledged PSI's response, and assured counsel that it would refrain from the further administration of the Funds' claim pending the district court's resolution of PSI's request for injunctive relief. (DCR 3, Ex. 3).

Despite (1) PSI's timely response to the Funds' NASD claim; (2) PSI's vehement objection to the NASD's jurisdiction; (3) the NASD's recognition of PSI's response; (4) the NASD's assurance that it would refrain from the further administration of the Funds' claim pending a determination of the district court petition; and (5) the absence of an NASD rule authorizing the entry of a party's default in arbitration, the Funds' counsel nevertheless requested that the NASD enter the default of PSI. (DCR 6, Ex. 8). The NASD ignored the Funds' request for entry of PSI's default; the Code does not authorize entry of either a party's default or a default arbitration award.

Undaunted, on May 5, 1994 the Funds filed a petition in the United States District Court for the Eastern District of Michigan to confirm the "phantom" default arbitration award purportedly entered by the NASD. (DCR 1). The civil cover sheet accompanying the petition asserts federal question jurisdiction as well as diversity of citizenship. (DCR 1; *See also* civil cover sheet served upon PSI, attached as Exhibit "2" to PSI's March 15, 1996 Supplemental Brief to the Sixth Circuit). In their petition to confirm, the Funds request judgment against PSI in the amount specified in the arbitration claim ($11,351,928.62). (DCR 1).

On June 3, 1994 PSI filed its answer, additional defenses and a counterclaim in the district court against the Funds. (DCR

3). PSI requested dismissal of the Funds' arbitration claim because it was untimely and ineligible for arbitration pursuant to § 15 of the Code. (DCR 3).[3] PSI also filed a motion to enjoin and dismiss the Funds' arbitration claim, as well as to dismiss the Funds' petition for confirmation of the "phantom" default arbitration award. (DCR 2). PSI's counterclaim alleged the existence of both diversity and federal question jurisdiction. (DCR 3, ¶ 7). In light of the Funds' (1) filing of their own district court petition; and (2) assertion of both federal question and diversity jurisdiction, jurisdiction was not in contest before the district court.

The district court heard oral argument on PSI's motion on December 1, 1994. On December 19, 1994 the district court issued a bench ruling granting both (1) PSI's motion to dismiss the Funds' petition to confirm arbitration award; and (2) PSI's motion to enjoin and dismiss the arbitration claim. (DCR 22).

The Funds maintained that their arbitration claim was timely. The Funds alleged (albeit in vague and conclusory

---

3. In their petition for a writ of certiorari (pp. 5, 12-13), the Funds assert that they signed PSI account opening documents containing an arbitration clause which *contractually* obligated the parties to arbitrate before the NASD. This assertion is not supported by the record. Instead, the duty to arbitrate derives from § 12 of the Code, which obligates NASD registrants and member firms, such as PSI, to arbitrate any dispute brought by a public customer, such as the Funds. Regardless of the source of the duty to arbitrate, PSI is obligated to arbitrate only eligible claims. PSI is not obligated to arbitrate stale claims, which are ineligible for submission to the NASD pursuant to § 15 of the Code.

The Funds unprofessionally accuse counsel of "fraudulently" stating that PSI "at no time agreed to arbitrate" the Funds' claims. (*See* petition for a writ of certiorari, p. 10.) Since (1) PSI's duty to arbitrate derives from the Code, and not a private pre-dispute arbitration agreement between the parties; and (2) PSI remains unwilling to arbitrate only ineligible claims, the Funds' charge rings hollow.

fashion) that PSI fraudulently concealed its wrongdoing, thereby tolling the claim filing deadline. The district court deferred ruling on the Funds' fraudulent concealment argument, allowing the parties the opportunity to provide additional evidence to the court on that specific issue. (DCR 22).

Subsequently, on December 23, 1994 the district court issued its written opinion and order. The court rejected the Funds' claim that PSI fraudulently concealed any alleged wrongdoing.[4] (DCR 23, pp. 6-10). The district court entered judgment in favor of PSI and against the Funds on January 4, 1995. (DCR 24). The Funds filed their notice of appeal on January 18, 1995, contesting both the dismissal of their petition to confirm as well as the dismissal of their NASD arbitration claim. (DCR 25).

On July 31, 1996 the Sixth Circuit affirmed the judgment of the district court. The appellate court concluded that (1) the requirements of diversity jurisdiction under 28 U.S.C. § 1332 had been met;[5] (2) it was for the district court, and not the

---

4. At the time the district and appellate courts ruled in this matter, the Sixth Circuit had not resolved whether § 15 was an absolute jurisdictional threshold akin to a statute of repose, and not subject to tolling, or whether it effectively operated as a statute of limitations subject to tolling. The Sixth Circuit has since, however, conclusively determined that eligibility provisions (such as § 15 and the corresponding New York Stock Exchange, Inc. ("NYSE") rule (Rule 603)) are absolute, impermeable jurisdictional thresholds which are *not* subject to tolling. *The Ohio Company v. Nemecek*, 98 F.3d 234 (6th Cir. 1996).

The Funds are obviously incorrect in stating that the Sixth Circuit will "allow for a tolling of the eligibility requirements of § 15 of the Code if fraudulent concealment has been pled with specificity." (*See* petition for a writ of certiorari, p. 7). This assertion is clearly contrary to the Sixth Circuit's holding in *Nemecek*.

5. Neither the district court nor the Sixth Circuit addressed whether an independent basis of federal question jurisdiction existed. The existence of diversity jurisdiction obviates the necessity of this Court's consideration of the Funds' federal question concerns.

arbitrators, to resolve the threshold arbitrability issue under § 15; and (3) the court need not resolve whether § 15 is subject to tolling on the basis of fraudulent concealment because the Funds did not adequately plead fraudulent concealment before the district court.

On August 14, 1996 the Funds filed a petition for rehearing and suggestion for rehearing *en banc*. On October 3, 1996 the Sixth Circuit denied the petition, and the Funds' petition for a writ of certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

The Funds invoked the jurisdiction of the district court but now seek to deny the court's jurisdiction to escape an adverse ruling. Nonetheless, the Sixth Circuit correctly decided that the district court had diversity jurisdiction over this dispute.The court found the parties are citizens of different states and, because the Funds seek in excess of $11 million from PSI, the amount in controversy exceeds the jurisdictional requisite of $50,000.

Moreover, the Sixth Circuit's decision does not present an important question for review, as required by Supreme Court Rule 10(a). The court below reaffirmed and applied Supreme Court precedent that courts (and not arbitrators) have the authority to determine the arbitrability of disputes.

I.

THE DISTRICT COURT HAD DIVERSITY JURISDICTION TO DISMISS THE FUNDS' PETITION FOR CONFIRMATION OF ARBITRATION AWARD AND GRANT PSI'S MOTION TO ENJOIN AND DISMISS ARBITRATION CLAIM.

During the relevant time frame, 28 U.S.C. § 1332 provided in pertinent part that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States . . .
>
> * * *
>
> (c) For the purposes of this section and section 1441 of this title —
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. §§ 1332 (a) and (c).

A. The Sixth Circuit's Conclusion.

The Sixth Circuit found diversity jurisdiction to exist:

> Because the parties are of diverse citizenship and the requisite minimum amount is in controversy, the district court had jurisdiction under 28 U.S.C. § 1332.

(*See* Supplemental Appendix for Petitioners ("PSA"), Appendix A at p. 6sa).

The court found that by the Funds' own admission, the requisites to diversity jurisdiction had been met. Also, it reasoned that it would be fundamentally unfair to allow the Funds to escape an adverse ruling by subsequently denying jurisdiction since:

> (1) the Funds admitted at oral argument that the parties are citizens of diverse states and the amount in controversy "greatly exceeds" $50,000; and
>
> (2) the Funds initially invoked the jurisdiction of the district court, lost on the merits, and then tried to avoid the preclusive effects of the district court's judgment by challenging jurisdiction on appeal.

(*Id.* at 5sa-6sa.)

B. The Parties Are Citizens Of Different States.

The present controversy is between citizens of different states. The Funds were established, maintain their principal place of business and operate in Detroit, Michigan. PSI is a Delaware corporation with its principal place of business in New York.

The Funds initiated district court proceedings by submitting

a petition to confirm arbitration award. A civil cover sheet signed by counsel asserts the parties' diversity. (DCR 1).

PSI timely answered the Funds' petition and filed a counterclaim. (DCR 3). PSI's counterclaim unmistakably asserts that the district court has jurisdiction under 28 U.S.C. § 1332 by virtue of the parties' diverse citizenship. (DCR 3, ¶¶ 5-7). The Funds admitted that this element of diversity jurisdiction existed in their reply to counterclaim (DCR 6, ¶¶ 5-6), as well as in oral argument before the Sixth Circuit.

It is beyond serious dispute that the parties are citizens of diverse states; the only remaining inquiry is whether the amount in controversy exceeds the sum or value of $50,000, exclusive of interest and costs. Similarly, there can be no serious dispute on this question.

C. The Amount In Controversy Exceeds $50,000.

The Funds' arbitration claim requests total damages of $11,351,928.62, broken down as follows:

> (a) $6,319,964.20 for loss of investment principal,
>
> (b) $4,000,000.00 in interest, and
>
> (c) $1,031,964.42 in attorney fees.

The *ad damnum* of the Funds' district court petition requests judgment "in the amount specified in the Claim for Arbitration" ($11,351,928.62).

The Funds, relying upon two factually distinguishable late

19th Century decisions, now apparently contend that the amount in controversy requirement has not been met. This argument is frivolous. This Court, in an early decision, *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288, 58 S. Ct. 586, 82 L. Ed. 845 (1938), articulated the general principle that the amount claimed by the plaintiff generally controls:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.

More recently, this Court, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 346-47, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), declared that:

> In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.

Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809, 815 (8th Cir. 1969), offers this common sense test for determining the amount in controversy:

> The test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce . . . it is the amount or value of that which the complainant claims to recover, or the sum value of that which the defendant will lose if the complainant succeeds in his suit . . .

See also Leininger v. Leininger, 705 F.2d 727, 729 (5th Cir. 1983) ("[T]he amount in controversy, in an action for declaratory or injunctive relief, is the value of the right to be protected or the extent of the injury to be prevented."); and *Hatridge*, citing with approval a leading scholar, Professor Charles Wright: "[T]he purpose of a jurisdictional amount, to keep trivial cases away from the court, is satisfied where the case is worth a large sum to either party." C. Wright, *Federal Courts* § 34, at p. 100 (1963).

Here, the value of the object of this litigation is $11,351,928.62. This is the sum claimed by the Funds in their district court petition. PSI asked the district court to enjoin and dismiss a claim presenting a risk of a potential loss in this amount. It is frivolous for the Funds to suggest that the amount in controversy is other than as claimed in their *ad damnum*. The amount in controversy is not trivial; it well exceeds the $50,000 minimum imposed by 28 U.S.C. § 1332(a); and the district court correctly concluded diversity jurisdiction existed.

II.

INELIGIBILITY OF THE FUNDS' ARBITRATION CLAIM PRESENTED A THRESHOLD ARBITRABILITY ISSUE APPROPRIATE FOR JUDICIAL RESOLUTION.

The Sixth Circuit succinctly summarized the Funds' key contention:

> The focus of the Funds' argument in their brief is that the district court should not have decided whether the claims against PSI were eligible for arbitration. Instead, the Funds argue, the district court should have ordered PSI to submit the arbitrability issue to an arbitration panel.

A. Courts (And Not Arbitrators) Decide Whether A Dispute Is Arbitrable, As Well As What Issues Must Be Arbitrated.

The Funds maintain that NASD arbitrators should decide the eligibility issue. This contention flies in the face of Supreme Court precedent. This Court has clearly empowered courts, and not arbitrators, with the authority to determine the scope of arbitration agreements:

> [T]he question of arbitrability — whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance — is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agree to arbitrate is to be decided by the court, not the arbitrator.

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986).

AT&T was quoted with approval by the Supreme Court five years later in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991). In *Litton*, the Supreme Court stated:

> [W]hether or not a [party] . . . is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to arbitrate the arbitrability issue.

The Sixth Circuit has adopted *AT&T* and *Litton* in *Roney and Co. v. Kassab*, 981 F.2d 894, 897-98 (6th Cir. 1992); *Dean*

Witter Reynolds, Inc. v. McCoy, 995 F.2d 649, 651 (6th Cir. 1993) (["T]he question of arbitrability under NASD § 15 is not arbitrable . . . [W]e hold only that the District Court must make [the eligibility] determination."); and most recently in *The Ohio Company v. Nemecek*, 98 F.3d 234 (6th Cir. 1996.)

A majority of the circuits are in accord that the primary power to decide arbitrability issues rests with the courts: *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996) ("[W]e join the Third, Sixth, Seventh and Eleventh Circuits in holding § 15 of the NASD Code defines the arbitrators' substantive jurisdiction and that the courts, not the arbitrators themselves, must decide whether a claim is time-barred under that provision."); *PaineWebber, Inc. v. Allen*, 45 F.3d 427 (4th Cir. 1995), *cert. denied*, 133 L. Ed. 2d 17, 116 S. Ct. 52 (1995), *affirming without opinion district court's conclusion*, 888 F. Supp. 53 (E.D. Va. 1993), that arbitrability was "undeniably an issue for judicial determination."; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 385 (11th Cir. 1995) ("[T]he court decides whether claims are timely under section [15] of the NASD Code."); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 514 (7th Cir. 1992) ("Thus, whether Section 15 bars a claim from submission to the arbitrators is for the court to decide, and it is irrelevant whether the arbitrators have already ruled on the question."); and *PaineWebber v. Hartmann*, 921 F.2d 507, 514 (3rd Cir. 1990) ("[T]he question of arbitrability is undeniably an issue for judicial determination."). The Code cannot reasonably be interpreted to conflict with Supreme Court precedent.[6]

---

6. The Funds refer to a split between the circuit courts on who decides arbitrability issues. *See* petition for a writ of certiorari, p. 7. The Funds, however (1) fail to explain why this case presents compelling circumstances on an important matter justifying Supreme Court review; (2) do not cite or discuss a single circuit court decision which favors its position; (3) cannot demonstrate that an arbitral resolution of this issue would alter the ultimate

(Cont'd)

Curiously, the Funds cite with approval both *AT&T* and *Litton*. (*See* petition for a writ of certiorari, p. 7). The Funds' reliance on *AT&T* and *Litton* is mystifying in view of their assertion that the arbitrators should decide whether a party is bound to arbitrate and what issues must be arbitrated. The Funds' position is neither logical nor consistent. Regardless, the law clearly authorizes courts, and not arbitrators, to make the threshold determination of a claim's eligibility for arbitration.

B. Section 15 Is Neither In Conflict With Nor Overridden By Other Sections Of The NASD Code Of Arbitration.

The Funds insist that § 15 is in conflict with §§ 35 and 6 of the Code. The Funds contend these sections override § 15. The Sixth Circuit did not reach this issue, but the Funds' argument is without merit.

1. Section 35: Interpretation Of Code

The primary objection advanced by the Funds is based upon § 35 of the Code, which provides in pertinent part:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code . . .

In *Cogswell*, 78 F.3d at 480, the Tenth Circuit appropriately observed that:

> § 35 states merely that "arbitrators shall be

(Cont'd)
outcome since the claim was filed well outside of the very generous six-year time frame imposed by § 15; and (4) incorrectly calculate the split: a majority of the circuits to decide the issue have ruled in PSI's favor.

> empowered to interpret and determine the applicability of all provisions under this Code." It says nothing specific about whether the arbitrator or the court should decide whether a claim is arbitrable under §15. Furthermore, it is well established under the generally applicable rules governing contract interpretation that specific provisions, like §15, take precedence over more general provisions, like §35. *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558, 48 L.Ed. 788, 24 S.Ct. 538 (1904) . . .

See also Cohen, 62 F.3d at 384; and *Sorrells*, 957 F.2d at 514.

The Funds misconstrue the plain intent and meaning of § 35. This section of the Code is intended to reserve the meritorious resolution of eligible claims to the arbitrators. Section 15 restricts those matters which are eligible for arbitral resolution by declaring jurisdictionally unworthy those claims which are stale. Section 35 cannot be reasonably read to preclude judicial determination of the arbitrability issue; such an interpretation would (1) conflict with Supreme Court precedent; (2) permit a more general Code provision to control a more specific provision; and (3) wrongly permit arbitrators to resolve the scope of their own jurisdiction in the absence of a clear and unmistakable expression of intent that the parties did not want a judicial resolution of this threshold issue.

2. Section 6: Legal Proceedings

The Funds also incorrectly argue that their filing of an arbitration claim bars PSI from seeking judicial relief. Section 6 provides:

> No party shall, during the arbitration of any matter, prosecute or commence any suit, action or proceeding against any other party touching upon any of the matters referred to arbitration pursuant to this Code.

The Funds' conduct and words are at odds. After all, the Funds initiated proceedings against PSI in the district court prior to the NASD conducting a hearing on the merits or rendering any type of award.

Section 6 has not troubled lower courts. It is well recognized that § 6 plainly means that after arbitrators have commenced a *hearing on the merits*, a party may not concurrently seek judicial relief on the substance of the dispute before the arbitrators. *See, e.g., Cogswell; Cohen.* Here, no hearing on the merits commenced; PSI has lawfully sought to preclude the hearing of a patently ineligible claim.

Finally, courts routinely hear requests for temporary injunctive relief in arbitrable disputes. Section 6 has been interpreted "to bar only parallel actions in court seeking to litigate the *substance* of the dispute in arbitration." SEC Release No. 34-36145, August 30, 1995. (Emphasis added). Section 6 in no way conflicts with § 15.

CONCLUSION

The district court properly found diversity jurisdiction. Moreover, this case raises threshold issues of arbitrability which were properly decided by the courts, not arbitrators.

For the reasons stated, the Funds' petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY M. SARETSKY
Counsel of Record
HERTZ, SCHRAM & SARETSKY, P.C.
Attorneys for Respondent
1760 South Telegraph
Suite 300
Bloomfield Hills, Michigan 48302
(810) 335-5000